

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

NO. 8 MINE, LLC,

Plaintiff,

v.

THE ELJEN GROUP, LLC, ELVEN E.  
JENNINGS, JACK ELKINS, FRANK  
LENTE, AND STEVE HARPER,

Defendants.

Case No.: 3:18-cv-00104-WGC

**ORDER**

THE ELJEN GROUP, LLC, *et al.*,

Counter-Plaintiffs,

v.

NO. 8 MINE, LLC,

Counter-Defendant.

THE ELJEN GROUP, LLC, *et al.*,

Third Party Plaintiffs,

v.

DAVID TACKETT, ARGENT ASSET  
GROUP, LLC, and ROBERT HIGGINS,

Third Party Defendants.

Defendants/counter-plaintiffs/third party plaintiffs the Eljen Group, LLC, Elven E. Jennings, Jack Elkins, Frank Lente, and Steve Harper (the Eljen parties) filed a Motion for an Order to Show Cause and for Sanctions against No. 8 Mine, LLC and David Tackett. (ECF No. 152.) No. 8 Mine and Tackett did not file a response to that motion. On April 20, 2020, the court granted the motion insofar as it issued an order to show cause for No. 8 Mine/ Tackett to address: (1) why No. 8 Mine and Tackett failed to reimburse the Eljen parties the sum

1 of \$1,721.68 in accordance with the court's March 5, 2020 order granting the Eljen parties'  
2 motion to compel; (2) why sanctions should not be imposed for the failure to comply with the  
3 court's order, including dismissal of No. 8 Mine's Second Amended Complaint and Tackett's  
4 Counterclaim (ECF No. 107), and striking their answer to the Eljen parties First Amended  
5 Counterclaim/Third Party Complaint (ECF No. 60). No. 8 Mine and Tackett were given until  
6 April 27, 2020 to file their response to the order to show cause. (ECF No. 154.) As of the date of  
7 this Order, no response has been filed.

8 The Eljen parties also filed a second motion to compel (ECF No. 153), but No. 8 Mine/  
9 Tackett also failed to respond to that motion. The parties also have filed motions for partial  
10 summary judgment. (ECF Nos. 137, 157.)

11 The court issues this Order: (1) dismissing third party defendants Robert Higgins and  
12 Argent Asset Group, LLC without prejudice; (2) granting the second motion to compel;  
13 (3) dismissing No. 8 Mine's Second Amended Complaint and Tackett's Counterclaim  
14 (ECF No. 107), and striking No. 8 Mine's and Tackett's answer to the Eljen parties First  
15 Amended Counterclaim/ Third Party Complaint (ECF No. 60)<sup>1</sup>; (4) denying the outstanding  
16 motions for partial summary judgment (ECF Nos. 137, 157) as moot; (5) vacating the joint  
17 pretrial order deadline; and (6) requiring the Eljen parties to submit a document identifying the  
18 counterclaims/third party claims against No. 8 Mine/Tackett with which they wish to proceed to  
19 judgment, and specify the amount of damages they claim they are have suffered as a result, with  
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21 <sup>1</sup> The Eljen parties actually filed a Second Amended Answer, Counterclaims and Third Party  
22 Claims (ECF No. 112) in response to No. 8 Mine's Second Amended Complaint and Tackett's  
23 Counterclaims. No. 8 Mine/Tackett never filed a response to the Second Amended  
Counterclaims and Third Party Claims; however, the court will still strike No. 8 Mine's/Tackett's  
answer to the First Amended Counterclaim/Third Party Complaint, but No. 8 Mine/Tackett  
currently have no defenses on record with respect to the Eljen parties' operative pleading.

1 a supporting explanation and evidence for the amounts. No. 8 Mine/Tackett will be allowed to  
2 file a response, and the Eljen parties may file a reply.

### 3 **I. BACKGROUND**

4 The Second Amended Complaint/Counterclaim concerns an alleged agreement among  
5 Tackett/No. 8 Mine and the Eljen parties for No. 8 Mine/Tackett to purchase 216,000 pounds of  
6 No. 8 turquoise from storage facilities in Crescent Valley, California, and Reno, Nevada, as well  
7 as some 64,000 pounds of No. 8 turquoise from a storage facility in Winnemucca, Nevada. No. 8  
8 Mine/Tackett assert claims for breach of contract, breach of the implied covenant of good faith  
9 and fair dealing, conversion, civil conspiracy, intentional interference with prospective economic  
10 advantage, unjust enrichment, fraud, negligent misrepresentation, and declaratory relief.  
11 (ECF No. 107.)

12 The Eljen parties deny No. 8 Mine/Tackett's claims and assert counterclaims against  
13 No. 8 Mine and third party claims against Tackett, as well as third party claims against Argent  
14 Asset Group, LLC, and Robert Higgins. The counterclaims/third party claims against No. 8  
15 Mine/Tackett include: declaratory and injunctive relief; unjust enrichment; fraud; breach of  
16 contract (in the alternative); violation of the injunction in 3:07-cv-230-LRH-RAM; conversion;  
17 elder abuse; and breach of the promise to deliver silver. They also include alter ego allegations  
18 as to Argent and Higgins. The third party claims against Argent Asset Group, LLC and Robert  
19 Higgins include breach of contract (third party beneficiary) and deceptive trade practice.  
20 (ECF No. 112.)

21 No. 8 Mine's complaint was originally removed from state court. (ECF No. 1.) The  
22 original complaint was filed on behalf of No. 8 Mine by Rendal B. Miller, Esq. (ECF No. 1-1 at  
23 8.) On March 28, 2018, a notice of association of counsel was filed by Nathan J. Aman, Esq.,

1 and Jeremy B. Clarke, Esq., of Fahrendorf, Vilorio, Oliphant & Oster, LLC, on behalf of No. 8  
2 Mine and Tackett. (ECF No. 15.) Mr. Miller disassociated from the case on April 24, 2018.  
3 (ECF No. 23.) On December 28, 2018, Mr. Aman and Mr. Clarke filed a motion to withdraw as  
4 counsel of record for No. 8 Mine/Tackett (ECF No. 63), and the court granted the motion at a  
5 hearing on February 4, 2019 (ECF No. 68). The court set a status conference for March 6, 2019,  
6 to determine how No. 8 Mine/Tackett would proceed, and the court explained that a limited  
7 liability company cannot represent itself. (ECF No. 68 at 3-4.)

8 On February 16, 2019, the Eljen parties filed a motion for preliminary injunction.  
9 (ECF No. 69.)

10 On March 5, 2019, Jeffrey Blaine Setness, Esq., entered an appearance on behalf of No. 8  
11 Mine/Tackett. (ECF No. 71.)

12 At a hearing on March 6, 2019, the court indicated that a temporary restraining order  
13 (TRO) was appropriate until there was a disposition of the motion for preliminary injunction, and  
14 issued the formal TRO on March 11, 2019. (ECF Nos. 73, 74.) The TRO precluded No. 8  
15 Mine/Tackett from dispossessing the No. 8 turquoise and silver bars in their possession until  
16 further order of the court. (ECF No. 74.)

17 No. 8 Mine/Tackett subsequently filed a motion to consolidate this case with  
18 case 3:18-cv-00028-WGC, which involves claims by Daniel and Pamela Harrington and  
19 Nightwatch Marine, LLC, against Tackett, for breach of contract related to the sale of  
20 approximately 130,000 pounds of turquoise ore. (ECF No. 81.) The court granted the motion  
21 insofar as the cases were consolidated for the limited pretrial purpose of determining the  
22 ownership of the 130,000 pounds of turquoise acquired by the Harringtons through discovery  
23 and dispositive motions. (ECF No. 95.)

1 On August 7, 2019, the parties stipulated to a preliminary injunction that No. 8  
2 Mine/Tackett, the Eljen parties, and the Harringtons/Nightwatch shall not dispossess any of the  
3 No. 8 turquoise or silver bars in dispute in the two cases until further order of the court.  
4 (ECF Nos. 104, 105.)

5 No. 8 Mine/Tackett filed their Second Amended Complaint/Counterclaims on August 29,  
6 2019. (ECF No. 107).

7 The Eljen parties filed their Second Amended Answer, Counterclaims, and Third Party  
8 Claims on September 20, 2019. (ECF No. 112.)

9 Argent Asset Group and Higgins were served with the Eljen parties' First Amended  
10 Answer, Counterclaims, and Third Party Claims on October 15, 2018. (ECF Nos. 61, 62.) The  
11 Eljen parties' counsel, Michael Carrico, Esq., certifies that the Second Amended Answer,  
12 Counterclaims, and Third Party Claims were sent to all counsel of record via CM/ECF.

13 (ECF No. 112 at 33.) Argent Asset Group and Higgins, despite being served with the First  
14 Amended Answer, Counterclaims, and Third Party Claims, never appeared in this case, and do not  
15 have counsel of record. Therefore, it does not appear that they were ever served with the Second  
16 Amended Answer, Counterclaims, and Third Party Claims. Prior to filing the Second Amended  
17 Answer, Counterclaims, and Third Party Claims, the Eljen parties had not moved for clerk's entry  
18 of default. They did file a notice on July 26, 2019, that Robert Higgins filed for bankruptcy  
19 protection. (ECF No. 102.) Since it does not appear that Argent Asset Group, LLC or Higgins were  
20 ever served with the Second Amended Answer, Counterclaims, and Third Party Claims, and  
21 because the Eljen parties have not taken action with respect to these parties, they will be dismissed  
22 from this action without prejudice.

1 On September 13, 2019, Mr. Setness filed a motion to withdraw as counsel for No. 8  
2 Mine/Tackett. (ECF No. 110.) The court granted the motion at a hearing on October 4, 2019, and  
3 gave Tackett/No. 8 Mine until November 4, 2019, to secure new counsel. (ECF No. 123.)

4 On October 16, 2019, the parties filed a stipulation resolving the consolidated issue of  
5 ownership of the turquoise ore which term innated consolidation of the two cases.  
6 In short, the Eljen parties withdrew their claim of ownership of the 130,000 pounds of turquoise  
7 ore at issue in the Harrington case. (ECF Nos. 126, 127.)

8 On November 12, 2019, Stephen M. Dixon, Esq., entered a notice of appearance on  
9 behalf of No. 8 Mine/Tackett. (ECF No. 130.) The court set a status conference for December 6,  
10 2019 (ECF No. 131); however, on December 5, 2019, Mr. Dixon filed a motion to withdraw as  
11 counsel for No. 8 Mine/Tackett (ECF No. 132). At the December 6, 2019, status conference the  
12 court extended the scheduling order deadlines (ECF No. 134), and on January 6, 2020, granted  
13 Mr. Dixon's motion to withdraw, giving No. 8 Mine/Tackett until February 10, 2020, to obtain  
14 new counsel. With respect to No. 8 Mine, the court again cautioned that a failure to find  
15 replacement counsel would likely result in dismissal of this action. (ECF No. 135.)

16 On January 9, 2020, the Eljen parties filed a motion to compel production of  
17 communications between Tackett and Paul Sugar, Jr. or Sr. (ECF No. 136.)

18 The Eljen parties also filed a motion for partial summary judgment on January 23, 2020.  
19 (ECF No. 137.)

20 On January 24, 2020, the court issued an order to show cause as No. 8 Mine had not yet  
21 indicated to the court that it had obtained replacement counsel as previously ordered. The court  
22 set a hearing on this issue for February 10, 2020, cautioning that a failure to enter an appearance  
23

1 of counsel on behalf of No. 8 Mine before the hearing would result in the court striking No. 8  
2 Mine's Second Amended Complaint. (ECF No. 138.)

3 On February 9, 2020, Mitchell L. Posin, Esq., entered a notice of appearance on behalf of  
4 No. 8 Mine and Tackett. (ECF No. 140.) At the February 10, 2020, hearing on the order to show  
5 cause, the court explained to Mr. Posin that previous attorneys for No. 8 Mine and Tackett  
6 withdrew as counsel due to non-payment of fees, which caused many delays in this case. The  
7 court advised Mr. Posin that it would not favorably receive a motion to withdraw for non-  
8 payment of fees and that Mr. Posin would "remain in this case for the duration," and Mr. Posin  
9 indicated his understanding. The court ordered No. 8 Mine/Tackett to file a response to the  
10 outstanding motion to compel by February 14, 2020, and to file a response to the motion for  
11 partial summary judgment by March 31, 2020. (ECF No. 141.)

12 No. 8 Mine/Tackett failed to file a response to the motion to compel. On February 21,  
13 2020, the court entered an order granting the motion to compel filed by the Eljen parties.  
14 (ECF No. 143.) The Eljen parties requested an award of attorney's fees under Federal Rule of  
15 Civil Procedure 37 as prevailing parties on the motion to compel. The court gave  
16 plaintiff/counter-defendant No. 8 Mine, LLC and third party defendant David Tackett until  
17 February 28, 2020, to file a response to the request for attorney's fees. (*Id.*) No response was  
18 filed.

19 No. 8 Mine/Tackett did file a response to the motion for partial summary judgment on  
20 February 24, 2020. (ECF No. 144.)

21 On February 27, 2020, the Eljen parties filed an emergency motion to take Tackett's  
22 deposition beyond the discovery cutoff deadline, because they had been trying to arrange it since  
23 August of 2019, but were delayed in getting it scheduled due to the repeated withdrawal of

1 Tackett's counsel. It was further noted that the Eljen parties' counsel sent Tackett's latest counsel  
2 a proposed stipulated order to allow the deposition to take place after the discovery deadline, but  
3 counsel did not respond. In addition, a telephone message was left for Mr. Posin, but a return call  
4 was not received. (ECF No. 145.) The court granted the motion. (ECF No. 146.)

5 Having failed to file a response to the motion to compel or request for fees related to the  
6 motion to compel, on March 5, 2020, the court ordered No. 8 Mine/Tackett to collectively  
7 reimburse the Eljen parties in the sum of \$1,721.68 on or before March 31, 2020. No. 8  
8 Mine/Tackett were advised that if they failed to timely do so they risked having their action  
9 against the Eljen parties dismissed. (ECF No. 148.)

10 On March 31, 2020, Mr. Posin filed a stipulation and proposed order to continue the  
11 dispositive motions deadline and deadline to file the joint pretrial order due to the recent  
12 COVID-19 pandemic. (ECF No. 150.) The court approved the stipulation. (ECF No. 151.)

13 On April 3, 2020, (ECF Nos. 152, 152-1 to 152-4), the Eljen parties filed a motion for an  
14 order to show cause for sanctions against No. 8 Mine/Tackett for failing to comply with the  
15 court's order to pay them \$1,721.68.

16 In addition, the Eljen parties assert that No. 8 Mine/Tackett failed to produce responsive  
17 communications between No. 8 Mine/Tackett and the Harringtons that the Eljen parties  
18 subsequently were alerted to through a motion for summary judgment filed in the *Harrington*  
19 case, 3:18-cv-00028-WGC. They acknowledge that a motion to compel is not necessary since the  
20 Eljen parties are in possession of the subject communications by virtue of the *Harrington* motion  
21 for summary judgment; however, they assert that they were prejudiced in not being able to use  
22 this information in connection with their motion for partial summary judgment in this case. They  
23 ask the court to accept into evidence the communications as additional support for the Eljen



1 parties' motion for partial summary judgment. The court allowed them to supplement their  
2 motion with respect to this issue.

3 On April 20, 2020, the court issued an order granting in part the motion for an order to  
4 show cause, ordering No. 8 Mine and Tackett to file a document on or before April 27, 2020,  
5 showing cause as to: (1) why they failed to reimburse the Eljen parties the sum of \$1,721.68 in  
6 accordance with the court's March 5, 2020 order; and (2) why sanctions should not be imposed  
7 for the failure to comply with the court's order, that may include dismissal of No. 8 Mine's  
8 Second Amended Complaint/Tackett's Counterclaim, and striking their answer to the Eljen  
9 parties First Amendment Counterclaim/Third Party Complaint. (ECF No. 154.)

10 No. 8 Mine/Tackett did not file a response to order to show cause.

11 On April 7, 2020, the Eljen parties filed a second motion to compel, or alternatively, a  
12 motion for an order to show cause. They request an order compelling No. 8 Mine/Tackett to  
13 disclose information regarding the sale of 181 silver bars received from Argent Asset Group,  
14 LLC; provide text messages between David Tackett and Steve Tackett; make available for  
15 inspection the originals of the contract documents in dispute; produce documents related to  
16 implementation of the June 16, 2017 joint venture agreement; and if they refused to do so, issue  
17 an order to show cause as to why they should not be held in contempt. (ECF No. 153.) No. 8  
18 Mine/Tackett did not file a response to this motion to compel.

19 Despite the fact that they could not be burdened to file a response to either motion to  
20 compel, to file a response to the motion ordering them to reimburse the Eljen parties for their  
21 fees spent on the successful motion to compel, to file a response to the motion for an order to  
22 show cause, or file a response to the order to show cause itself, on May 5, 2020, No. 8  
23 Mine/Tackett filed their own motion for partial summary judgment. (ECF No. 157.)

1 For the reasons set forth below, the third party claims against Higgins and Argent will be  
2 dismissed without prejudice; the outstanding motion to compel is granted; No. 8 Mine/Tackett's  
3 Second Amended Complaint and Counterclaims are dismissed; No. 8 Mine and Tackett's answer  
4 to the Eljen parties' First Amended Counterclaim and Third Party Complaint is stricken; the  
5 outstanding motions for partial summary judgment are denied as moot; and the joint pretrial  
6 order deadline is vacated. The Eljen parties shall submit a document identifying the  
7 counterclaims/third party claims against No. 8 Mine/Tackett on which they wish to proceed to  
8 judgment, and specify the amount of damages they claim they are have suffered as a result, with  
9 a supporting explanation and evidence for the amounts. No. 8 Mine/Tackett will be allowed to  
10 file a response, and the Eljen parties may file a reply.

## 11 II. DISCUSSION

### 12 A. Higgins and Argent Asset Group, LLC

13 Third party defendants Argent Asset Group and Higgins were served with the Eljen  
14 parties' First Amended Answer, Counterclaims, and Third Party Claims on October 15, 2018.  
15 (ECF Nos. 61, 62.) They did not enter an appearance, file an answer or otherwise respond to the  
16 Eljen parties' pleading. The Eljen parties took no action to pursue clerk's entry of default. On  
17 July 26, 2019, over nine months after they were served, the Eljen parties filed a notice that  
18 Robert Higgins had filed for bankruptcy protection. (ECF No. 102.)

19 The Second Amended Answer, Counterclaims, and Third Party Claims was filed on  
20 September 20, 2019. (ECF No. 112.) The Eljen parties' counsel, Michael Carrico, Esq., certifies  
21 that the Second Amended Answer, Counterclaims and Third Party Claims was sent to all counsel  
22 of record via CM/ECF. (ECF No. 112 at 33.) Argent Asset Group and Higgins, despite being  
23 served with the First Amended Answer, Counterclaims, and Third Party Claims, never appeared

1 in this case, and do not have counsel of record. Therefore, it does not appear they were ever  
2 served with the Second Amended Answer, Counterclaims, and Third Party Claims. Prior to filing  
3 the Second Amended Answer, Counterclaims, and Third Party Claims, the Eljen parties had not  
4 moved for clerk's entry of default.

5 Since it does not appear that Argent Asset Group, LLC or Higgins were ever served with  
6 the Second Amended Answer, Counterclaims, and Third Party Claims, dismissal without  
7 prejudice of Argent Asset Group, LLC, and Higgins is appropriate under Federal Rule of Civil  
8 Procedure 4(m).

9 In addition, the court finds it appropriate to dismiss Robert Higgins and Argent Asset  
10 Group, LLC, without prejudice, for failure to prosecute. *See Link v. Wabash R.R. Co.*, 370 U.S.  
11 626, 633 (1962) (trial court has inherent power to sua sponte dismiss for failure to prosecute);  
12 *Anderson v. Hughes Helicopters, Inc.*, 865 F.2d 263 (9th Cir. 1988). The court's ability to  
13 manage its docket, the public interest in expeditious resolution of cases weigh in favor of this  
14 result. There will be no prejudice to the Eljen parties as they have not taken any action with  
15 respect to these defendants since they were served, and the dismissal is without prejudice. The  
16 policy favoring disposition of cases on the merits also weighs in favor of dismissal without  
17 prejudice (as opposed to dismissal with prejudice).

18 **B. The Eljen Parties' Second Motion to Compel (ECF No. 153)**

19 The Eljen Parties filed a second motion to compel No. 8 Mine/Tackett to: (1) disclose  
20 information regarding the sale of 181 silver bars received from Argent Asset Group, LLC;  
21 (2) produce text messages between David Tackett and Steve Tackett; (3) make available for  
22 inspection the originals of the contract documents in dispute; (4) produce documents relating to  
23

1 implementation of the June 16, 2017 Joint Venture Agreement. No. 8 Mine/Tackett failed to file  
2 a response to the motion.

3 "The failure of an opposing party to file points and authorities in response to any motion,  
4 except a motion under Fed. R. Civ. P. 56 or a motion for attorney's fees, constitutes a consent to  
5 the granting of the motion." LR 7-2(d). Therefore, the Eljen parties' second motion to compel  
6 (ECF No. 153) is granted. It is up to the Eljen parties' whether they still find compliance with the  
7 order necessary in light of the court's conclusions in this order; however, No. 8 Mine/Tackett's  
8 conduct necessitated the filing of the motion in the first place; therefore, if they chose to do so,  
9 the Eljen parties are permitted to file a motion requesting reimbursement of fees incurred in  
10 connection with the motion. No. 8 Mine/Tackett may file a response, and the Eljen parties may  
11 file a reply.

## 12 **C. Sanctions**

### 13 **1. Rule 37**

14 The court granted the Eljen parties' first motion to compel under Federal Rule of Civil  
15 Procedure 37(a)(3), and awarded the payment of fees incurred in connection with the motion  
16 under Rule 37(a)(5)(A).

17 If a party:

18 fails to obey an order to provide or permit discovery, including an  
19 order under Rule 26(f), 35, or 37(a), the court where the action is  
20 pending may issue further just orders. They may include the  
21 following:

21 (i) directing that the matters embraced in the order or other  
22 designated facts be taken as established for purposes of the action,  
23 as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing  
designated claims or defenses, or from introducing designated  
matters in evidence;

- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii).

"Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

No. 8 Mine/Tackett have failed to obey an order under Rule 37(a)—that they pay the Eljen parties' fees incurred in filing the successful motion to compel. Then the court ordered them to show cause as to why the funds were not reimbursed. They also failed to respond to the order to show cause. Therefore, sanctions are appropriate under Rule 37(b)(2)(A) and/or 37(b)(2)(C). Sanctions under this rule include dismissal of an action in whole or in part and the striking of pleadings. The court will discuss below why these harsh sanctions are appropriate in this case. *See National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 640-43 (1976) (courts have considerable discretion to impose the extreme sanction of dismissal or default where there has been flagrant, bad faith disregard of discovery duties); *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990) (citation omitted) (noting that in considering whether dismissal or default is appropriate under Rule 37, the court shall consider: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of

1 prejudice to the party seeking sanctions; (4) the public policy favoring disposition on the merits;  
2 and (5) the availability of less drastic sanctions).

### 3 **2. Local Rule 1A 11-8**

4 In addition, Local Rule 1A 11-8 governs sanctions in the District of Nevada, and also  
5 provides that the court may impose *any and all appropriate sanctions* on an attorney or party  
6 who fails to comply with an order of the court, after giving the party or attorney notice and an  
7 opportunity to be heard. LR 1A 11-8(e).

8 Not only did No. 8 Mine/Tackett fail to respond to the order requiring them to reimburse  
9 the Eljen parties' for the fees incurred in connection with the successful motion to compel, but  
10 they then failed to respond when the court ordered them to show cause as to why sanctions  
11 should not be entered. Therefore, No. 8 Mine/Tackett have failed to comply with at least two  
12 orders of the court. This is coupled with their failure to respond to additional filings by the Eljen  
13 parties, and then cavalierly file their own motion for partial summary judgment when it suits  
14 them.

15 Therefore, sanctions, including dismissal and striking of pleadings, are appropriate under  
16 Local Rule 1A 11-8(e).

### 17 **3. The Court's Inherent Power**

18 Moreover, a federal district court has inherent authority to sanction conduct abusive of  
19 the judicial process. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991).

20 Before imposing sanctions under its inherent sanctioning authority, a court must make an  
21 explicit finding of bad faith or willful misconduct. *In re Dyer*, 322 F.3d 1178, 1196 (9th Cir.  
22 2003); *see also Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir. 2001). Recklessness, when  
23 combined with an additional factor such as frivolousness, harassment, or an improper purpose,  
may support sanctions. *See In re Girardi*, 611 F.3d 1027, 1061 (9th Cir. 2010); *Gomez v.*

1 *Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001); *Fink*, 239 F.3d at 994. Mere negligence or  
2 recklessness alone will not suffice. *In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009). Thus,  
3 “sanctions are available if the court specifically finds bad faith or conduct tantamount to bad  
4 faith.” *Fink*, 239 F.3d at 994.

5 Inherent power sanctions may be imposed against attorneys, clients, and pro se litigants.  
6 *Aleyska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). The court’s  
7 “inherent power ‘extends to a full range of litigation abuses.’” *Fink*, 239 F.3d at 992 (quoting  
8 *Chambers*, 501 U.S. at 46-47).

9 “[O]utright dismissal of a lawsuit ... is a particularly severe sanction, yet is within the  
10 court’s discretion.” *Chambers*, 501 U.S. at 45 (citation omitted).

11 When a party seeks dismissal as a sanction, the court must weigh five factors before  
12 imposing such a sanction: (1) the public’s interest in expeditious resolution of litigation, (2) the  
13 court’s need to manage its dockets, (3) the risk of prejudice to the party seeking sanctions, (4) the  
14 public policy favoring the disposition of cases on their merits, and (5) the availability of less  
15 drastic sanctions. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th  
16 Cir. 1995). These are the same factors that are relevant to consideration of dismissal under Rule  
17 37, discussed above.

18 The public has an interest in expeditious resolution of litigation, and the conduct of No. 8  
19 Mine/Tackett throughout most of this litigation has not furthered that goal. Instead, No. 8  
20 Mine/Tackett have shown little interest in fulfilling discovery obligations or complying with  
21 court orders. In addition, No. 8 Mine/Tackett have needlessly delayed the expeditious resolution  
22 of this case on numerous occasions. They have had five different attorneys/law firms in this case.  
23 Each previous attorney withdrew due to non-payment and/or ineffective communication, which

1 resulted in months of delays while No. 8 Mine/Tackett attempted to secure substitute counsel.  
2 No. 8 Mine/Tackett have failed to respond to motions and court orders, only to file their own  
3 motions or even requests for extension of stipulation for continuances of deadlines when it suited  
4 them. They have ignored requests to cooperate with discovery, failed to produce discovery,  
5 failed to respond to orders compelling discovery, and then failed to respond to requests to take a  
6 deposition outside of discovery that was delayed due to the continual withdrawal of their  
7 counsel. The public's interest in efficient resolution of cases has been thwarted by No. 8  
8 Mine/Tackett's conduct. Therefore, this factor weighs in favor of imposing sanctions.

9       This same conduct described above has adversely impacted the court's ability to manage  
10 its docket. It is difficult to keep a case on track when the court cannot rely on a party or counsel  
11 to respond to motions or orders of the court. The court has had to devote countless hours in  
12 attempting to get No. 8 Mine/Tackett to fulfill their obligations under the rules. *See e.g.*  
13 *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) ("It is incumbent upon the Court to  
14 manage its docket without being subject to routine noncompliance of litigants."). Thus,  
15 considerations of judicial economy weigh in favor of imposing sanctions.

16       The risk of prejudice to the party seeking sanctions is clear. If sanctions are not  
17 administered, the Eljen parties will continue to have to needlessly spend time moving to compel  
18 No. 8 Mine/Tackett to respond to discovery, to respond to orders compelling discovery, and to  
19 otherwise comply with the rules. This factor also weighs in favor of the imposition of sanctions.

20       The public policy favoring the disposition of cases on their merits weighs against the  
21 imposition of dismissal, but this factor does not outweigh the other factors.

22       Finally, the court will address the availability of less drastic sanctions. The court is not  
23 convinced that any less drastic sanction would be effective in gaining No. 8 Mine/Tackett's



1 compliance. They have failed to respond to motions; they have failed to pay monetary sanctions  
2 when ordered after they failed to respond to a motion to compel; and, they even failed to respond  
3 to the order to show cause as to why sanctions should not be imposed when they were warned  
4 that if no response was filed dismissal was a likely result. Instead, when faced with court orders  
5 to pay fees to the Eljen parties, another motion to compel, and an order to show cause, No. 8  
6 Mine/Tackett did not respond. At the same time, they went ahead with filing their own motion  
7 for partial summary judgment, which makes no mention of these issues. In light of this, further  
8 monetary sanctions or a contempt order would not be effective. Evidentiary sanctions would  
9 likely have the same effect as dispositive sanctions at this point. The failure to respond to  
10 motions to compel, to orders imposing sanctions, and to the order to show cause demonstrates a  
11 willful disregard for this court's orders that is tantamount to bad faith, and lesser sanctions would  
12 be ineffective and insufficient to address this behavior. Moreover, No. 8 Mine/Tackett have been  
13 given multiple opportunities to comply with the court's orders and explain their deficient conduct  
14 to avoid this specific result, to no avail. In fact, by filing other documents with the court without  
15 addressing the orders at issue, they have demonstrated complete indifference to the court's  
16 warnings. This type of flagrant disregard of their obligations not only to the court, but to the  
17 other parties to this case, justifies these sanctions.

18       Therefore, the court finds that the majority of the factors weigh in favor of imposing  
19 sanctions, and that the appropriate sanctions are dismissal of No. 8 Mine/Tackett's Second  
20 Amended Complaint and Counterclaims, and striking their answer to the Eljen parties' First  
21 Amended Counterclaims and Third Party Claims. The court strike's the answer to the First  
22 Amended Counterclaim and Third Party Claims as the last pleading filed in response to the Eljen  
23 parties' claims; however, the court points out that No. 8 Mine/Tackett did not ever file an answer

1 or otherwise respond to the Eljen parties' Second Amended Counterclaims and Third Party  
2 Claims, so they currently have no defenses on record as to the operative pleading.

#### 3 **4. Conclusion**

4 In conclusion, the court finds that dismissal of No. 8 Mine/Tackett's Second Amended  
5 Complaint/Counterclaims (ECF No. 107) as well as striking their answer to the Eljen parties'  
6 First Amended Counterclaim/Third Party Complaint (ECF No. 60) is appropriate under Rule 37,  
7 Local Rule 1A 11-8(e), as well as the court's inherent power.

#### 8 **D. Outstanding Motions for Partial Summary Judgment and Deadlines**

9 In light of the court's conclusion that No. 8 Mine/Tackett's Second Amended  
10 Complaint/Counterclaim should be dismissed and the answer to the Eljen parties' First Amended  
11 Counterclaim/Third Party Complaint should be stricken as a sanction for No. 8 Mine/Tackett's  
12 failure to comply with court orders, the outstanding motions for partial summary judgment  
13 (ECF Nos. 137, 157) are denied as moot.

14 In addition, the current joint pretrial order deadline is vacated.

#### 15 **E. Proceeding to Judgment**

16 Within 14 days of the date of this Order, the Eljen parties shall submit a document  
17 identifying the counterclaims/third party claims against No. 8 Mine/Tackett on which they wish  
18 to proceed to judgment, and specify the amount of damages they claim they have suffered as  
19 a result, with a supporting explanation and evidence for the amounts. No. 8 Mine/Tackett will be  
20 allowed to file a response, and the Eljen parties may file a reply. To the extent that the Eljen  
21 parties' motion for partial summary judgment adequately addresses this topic I, II, III, VI,  
22 (and the Eljen parties do not wish to pursue the counterclaims/third party claims not addressed in  
23 the motion for partial summary judgment: breach of contract (claim IV), violation of injunction  
(claim V), and elder abuse (claim VII)), they may simply file a notice to that effect.

**III. CONCLUSION**

(1) Robert Higgins and Argent Asset Group, LLC are **DISMISSED WITHOUT PREJUDICE**.

(2) The Eljen parties' motion to compel (ECF No. 153) is **GRANTED**. If they chose to do so, on or before **May 22, 2020**, the Eljen parties may file a motion requesting reimbursement of fees incurred in connection with this motion to compel under Rule 37. Any response is due by **June 5, 2020**, and any reply is due on or before **June 12, 2020**.

(3) No. 8 Mine's Second Amended Complaint/Tackett's Counterclaim (ECF No. 107) is **DISMISSED**.


(4) No. 8 Mine's and Tackett's Answer to the Eljen parties' First Amended Counterclaim/Third Party Complaint (ECF No. 60) is **STRICKEN**.

(5) The outstanding motions for partial summary judgment ECF Nos. 137, and 157) are **DENIED AS MOOT**, and the joint pretrial order deadline is **VACATED**.

(6) On or before **May 22, 2020**, the Eljen parties shall submit a document identifying the counterclaims/third party claims against No. 8 Mine/Tackett on which they wish to proceed to judgment, and specify the amount of damages they claim they are have suffered as a result, with a supporting explanation and evidence for the amounts; or, indicate that their motion for partial summary judgment at ECF No. 137 adequately reflects this information. If they file a new document, No. 8 Mine/Tackett may file a response on or before **June 5, 2020**. Any reply is due on or before **June 12, 2020**.

**IT IS SO ORDERED.**

Dated: May 7, 2020

  
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William G. Cobb  
United States Magistrate Judge